In the Supreme Court
OF THE
United States

October Term, 1942

No. 46

W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, et al.,
Appellants,

vs.

Porter L. Brown,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

Irvine P. Aten,
Richard V. Aten,
G. L. Aynesworth,
Helm Building, Fresno, California,
Christian M. Ozias,
Brix Building, Fresno, California,
William M. Miles,
Brix Building, Fresno, California,
Attorneys for Appellee.

Pernau-Walsh Printing Co., San Francisco, California

Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

Miscellaneous

In the Supreme Court

OF THE

United States

October Term, 1942

No. 46

W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, et al.,

Appellants,

vs.

Porter L. Brown,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

During the oral presentation of the above case to the court, it was suggested by members of the court that the Sherman Anti-Trust Law, the Agricultural Adjustment Act, the due process clause of the Fourteenth Amendment, and other federal laws might be applicable and that it would be desirable to have the case argued upon any and all applicable federal laws. Later the court made an order for reargument,

to include a due consideration of applicable federal laws.

Responsive to the court's order, appellee will discuss the case with respect to the applicability of

a. The Sherman Anti-Trust Law.

b. The Clayton Act.

c. The Agricultural Adjustment Act.

d. Due process clause of the Fourteenth Amendment, and

e. Capper-Volstead Act.

Preliminary to a discussion of those statutes, it seems pertinent to call attention to certain Supreme Court decisions holding that the present suit in equity is properly brought against the various defendants, allegedly state officials. State officials may be enjoined from enforcing an unconstitutional Act.

Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714;

Hopkins v. Clemson Agricultural College, 221 U. S. 636-643, 55 L. Ed. 890;

Looney v. Crane Co., 245 U. S. 178-191, 38 S. Ct. 85, 62 L. Ed. 230-6;

Gibbs v. Buck, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111.

SHERMAN ANTI-TRUST LAW.

The application of the Anti-Trust Law will be under headings as follows:

1. Pleadings—complaint and answer.

2. Stipulation as to facts.

3. Judgment—findings of fact.

4. Decision of three judge court—cross-demand.

5. Sufficiency of the pleadings.

6. Authorities.

1. Pleadings—complaint and answer.

The first paragraph of the first amended complaint alleges:

> "That jurisdiction is founded on the existence of Federal questions and amount in controversy; that the action arises under the Constitution of the United States, Article I, Section 8, Clause 3, and under Title 15, Sections 1 to 33 of the United States Code, as hereinafter more fully appears; that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00." (R. 1.)

The second paragraph alleges: That Raisin Proration Zone No. 1 is organized under the Agricultural Prorate Act of the State of California (see Chap. 754, Statutes of California, 1933, and Amendments); and that the defendants are the officers of the Agricultural Probate Advisory Commission and the Zone (R. 1); that W. B. Parker is the Director of Agriculture of the State of California. (R. 2.)

Paragraph III alleges that appellee Brown, during the life of the program, has owned 100 acres of real property improved to bearing gravevines. (R. 2.)

Paragraph IV alleges:

> "That the program committee of said zone has attempted to institute a seasonal marketing program which defendants declared effective September 7, 1940; that defendants threaten to enforce said alleged seasonal marketing program against plaintiff; that said program provides briefly that all sub-standard raisins shall be withdrawn from the market;"

(The terms of the program are then outlined.)

> "and that no packer or handler of raisins may purchase any standard * * * raisins from any of the growers in said zone until said growers have complied with all of the foregoing requirements and received primary and secondary certificates from said zone evidencing such compliance." (R. 2.)

Paragraph V alleges: That approximately 95% of the raisins grown by plaintiff and the other producers in the Zone are sold in interstate or foreign commerce; "that plaintiff is deprived by reason of said act and program of his right to dispose of his raisins in interstate and foreign commerce". (R. 3.)

Paragraph VI alleges: That heretofore plaintiff has engaged in the business of packing, shipping, and selling in interstate and foreign commerce raisins produced by himself and raisins purchased by plaintiff from other persons; that defendants will compel delivery of all sub-standard raisins and 70% of standard raisins to the Zone; that defendants will, unless enjoined, withhold all sub-standard raisins and the 20%

surplus pool from the normal channels of trade, and another 50% will be allowed to enter the channels of trade only upon such terms and conditions as defendants prescribe; that 30% of the raisins may be sold by the grower, provided he shall have complied with the other parts of the program and paid $2.50 per ton on the 30%; that defendants threaten a virtual embargo on the shipment of raisins in interstate commerce; that prior to the adoption of said marketing program plaintiff entered into contracts to sell raisins in interstate commerce; that if the program is enforced,

> "plaintiff will be unable to secure raisins with which to fulfill said contracts and plaintiff will be subjected to liability on said contracts in approximately the sum of $8000.00 and will, in addition, lose profits on said contracts in approximately an equal amount; that plaintiff expects and will be able to ship out of this state during the current marketing season 2500 tons of raisins in addition to the raisins covered by said contracts; that as aforesaid, if defendants enforce said act and program, plaintiff will be unable to secure said 2500 tons of raisins for said shipment; that plaintiff would make a profit on said 2500 tons of raisins at the rate of from $5.00 to $12.00 per ton; and that unless defendants are enjoined from enforcing said program, plaintiff will lose such profit." (R. 3 and 4.)

Paragraph VII alleges:

> "That the 1940 raisin crop is now ready for the market and that the normal market for such raisins will be lost after December 20, 1940; that unless said program is quickly declared uncon-

stitutional, the plaintiff and all the growers in said zone will be irreparably damaged by the loss of such market; * * *." (R. 4.)

Paragraph VIII alleges: That said act and program provides civil and criminal penalties so unusual, oppressive, and unreasonable that plaintiff will be precluded from asserting his rights independently and challenging in court by defensive tactics the validity of said act and program (see 1939 Supp., Deering's California Codes and General Laws, Act 143a, Sections 22.5, 24 and 25, wherein severe penalties are imposed, both civil and penal); that the enforcement of the program will cause plaintiff to lose an average of \$9.00 per ton per year on raisins grown by plaintiff; that plaintiff produces an average of 200 tons per year; that defendants will continue said program in force for many years in the future unless enjoined. (R. 4.)

Paragraph X alleges:

"That defendants will, unless restrained, attempt to enforce and procure the enforcement of, against plaintiff, the civil and criminal penalties provided in said act; that defendants will, unless restrained, attempt to enforce and procure the enforcement of the civil and criminal penalties provided in said act against growers from whom plaintiff purchases raisins and against other persons with whom plaintiff has dealings in raisins, thereby preventing plaintiff from obtaining raisins for interstate shipment; that plaintiff has no adequate remedy at law whereby plaintiff can prevent the filing of civil or criminal actions

> against him or against said persons dealing with him." (R. 5.)

Paragraph XI alleges:

> "That defendants are maintaining at and near plaintiff's place of business watchers and spies for the purpose of ascertaining from whom plaintiff purchases raisins and for the purpose of intimidating such sellers and preventing the sale of raisins to plaintiff for shipment in interstate commerce; * * *." (R. 5.)

Paragraph XII alleges that defendants have received approximately 100,000 tons of raisins and

> "that defendants are now and intend to continue withholding said raisins from interstate commerce in restraint of trade and for the purpose of maintaining the monopoly prices." (R. 5.)

In the answer defendants allege as follows:

Admit and allege that defendants, pursuant to the marketing program for raisins as amended in effect in said Raisin Proration Zone No. 1, did approve and adopt a seasonal marketing program for raisins for 1940-41, effective September 7, 1940, and that defendants have enforced and intend to enforce such seasonal marketing program for raisins against plaintiff and all other persons subject to the provisions thereof. (P. IV, R. 7.)

Admit that plaintiff has been engaged in the business of packing, shipping and selling raisins in intrastate, interstate and foreign commerce, and that some of such raisins were produced by plaintiff and the bal-

ance thereof plaintiff purchased from other producers and was engaged as a packer and handler of such raisins; and admit that so far as defendants know plaintiff presumably desires to continue such business. (P. VI, R. 9.)

Admit that defendants will to the best of their ability, unless restrained, endeavor to enforce and procure the enforcement of all of the provisions of the Agricultural Prorate Act and of the proration program for raisins thereunder against plaintiff and all other persons subject thereto. (P. X, R. 10.)

2. **Stipulation as to facts.**

Producers of raisins pick, dry and cure the raisins on the farm, then sell them to packers. (Pp. 4, 5, 6 and 7, R. 15.)

Small packers do not have any carry-over from season to season and purchase their raisins for commercial sale and distribution to the public. (P. 8, R. 16.)

90 to 95% of all raisins consumed as raisins and for human consumption are consumed outside the State of California. (P. 9, R. 16.)

That some producers contract for the sale of their raisins several weeks in advance of the delivery of said raisins. (P. 11, R. 17.)

The foregoing excerpts from the pleadings and the stipulation of facts show that the defendants have set up a program for the handling of raisins by which the grower is deprived of the possession of 70% of his raisins. 20% of the raisins are placed in a surplus

pool and disposed of not in interstate commerce but for by-product purposes. 50% of the raisins are sold and disposed of at such price and in such quantities and at such times as the program committee in its discretion may determine (all of which is in harmony with Section 19.1 of the Act). In order to make the powers of the committee unlimited and without restriction, Section 19.1 provides:

"The program committee shall have title to all such pools and shall handle all commodities received by a pool and account for the same to the producers beneficially interested on a pool basis."

While the Act contains provisions authorizing the control of production of raisins, there is not a word in the program, as formulated by the program committee and approved by the Director of Agriculture, which attempts to control the production of raisins. The first point at which it assumes any control over the grower's product is after the grape has been severed from the vine, properly dried and cured by the grower, boxed and ready for delivery to the packer for cleaning, stemming, cap stemming and boxing for delivery in interstate and foreign commerce.

3. Judgment—findings of fact.

The court made special findings of fact as follows:

That defendants are attempting to enforce the Agricultural Prorate Act (Chapter 754, California Statutes 1933) as amended, and are claiming penalties in the amount of $13,000.00 against the plaintiff; that defendants have directly interfered with and ob-

structed plaintiff's business and damaged plaintiff in excess of $3000.00, exclusive of interest and costs, and that the matter in controversy exceeds $3000.00, exclusive of interest and costs. (P. I, R. 52.)

That an original program was adopted in 1937, and an amended seasonal program for marketing raisins for 1940-1941 was duly and regularly adopted and approved and became effective September 7, 1940. (P. III, R. 54.)

That in accordance with said seasonal program 20% of all standard raisins of the 1940 crop shall be delivered to a surplus pool, for which $27.50 per ton shall be advanced for Muscat and Thompson Seedless raisins, and $25.00 per ton for Sultanas; that 50% of the standard raisins shall be delivered into a stabilization pool, and that the producers shall receive $55.00 per ton for Muscat and Thompson Seedless raisins, and $50.00 per ton for Sultanas; and that the balance of such standard raisins, to-wit, 30%, may be disposed of by the grower without restriction, provided he shall pay $2.50 per ton for each ton of the so-called "free tonnage", provided he has prior thereto delivered 70% into the surplus and stabilization pools. (P. IV, R. 54.)

That the standard raisins in the surplus pool cannot be sold prior to January 1 of the marketing season in which such pool is established; that the sale shall be made in accordance with the methods and at the prices which in the judgment of the committee or its authorized agency and the Director are the most advantageous to the producers. (P. IV, R. 55.)

That stabilization pool raisins shall be sold as soon as practicable after delivery of same to any agency authorized to receive such raisins. The sale of such raisins shall be made in accordance with the methods and at the prices which in the judgment of the committee or its authorized agency and the Director are the most advantageous to the producers of raisins; provided, however, that no sales of raisins from a stabilization pool, * * *, shall be made at less than the prevailing market price for raisins of the same variety and grade on the date of sale. (P. IV, R. 55 and 56.)

That 90% to 95% of such raisins produced in said Zone are consumed outside the State of California. (P. VI, R. 56 and 57.)

That raisins are completely cured and dried on the farm.

> "Such process is entirely accomplished on the premises where the grapes are grown, and when properly done, the grapes have been entirely dried and cured and are a wholesome food and sound article of commerce. They are then substantially ready for market as raisins. The process of cleaning, stemming, cap-stemming, seeding (Muscats only), grading, sorting and packaging in various sized containers, which is not uniform in packing plants, tends to make the raisins more desirable commercially and thus create a greater demand for them in the market, but is not essential to production."
>
> (P. VIII, R. 57 and 58.)

That plaintiff is both a producer and packer of raisins, and that he produced approximately 200 tons

of raisins in said Zone in the year 1940. That no seasonal marketing program for raisins was adopted or in effect in 1939. That plaintiff did not in any manner participate in the 1940 seasonal program. That the 1938 seasonal marketing program did not have any provision for a stabilization pool. That packers make their purchases and take delivery in California; that sales are completed when the delivery is made; that before packing and shipping such raisins the packers clean, stem and package them, making the raisins more desirable commercially; that such operation by the packers is not essential to production. (P. IX, R. 58.)

That plaintiff as a packer contracts for delivery of a very large percentage of the raisins he handles directly into interstate and foreign commerce; that on September 7, 1940, plaintiff had substantial orders for out of state delivery of raisins which he could not fill by purchase of "free tonnage" and could not fill at all because of said pools without complying with said program; that defendants in enforcing said program have directly and substantially interfered with and obstructed plaintiff's said business and have directly and substantially burdened interstate and foreign commerce. (P. X, R. 59.)

That defendants have attempted to enforce said act as implemented by said program against plaintiff and against those persons who have sold raisins to plaintiff since September 7, 1940; that since said date said defendants have maintained watchers at and near plaintiff's place of business for the purpose of ascertaining from whom plaintiff purchases raisins and for the

purpose of preventing sales of raisins to plaintiff in violation of said program; that defendants threaten to continue to enforce said program against plaintiff and persons selling 1940 crop raisins to him; that defendants have attempted, and are attempting and threatening, to force plaintiff and all other raisin growers to deliver and dispose of the 1940 crop by and through said program, and have attempted, and are attempting, to prevent disposal of such raisins except through said program. (P. XI, R. 59.)

As part of the conclusions of law, the court states that said seasonal marketing program constitutes and is a direct, substantial, and illegal interference with interstate and foreign commerce in wholesome and sound raisins. (P. II, R. 60.)

That plaintiff is entitled to an injunction enjoining defendants from enforcing said program against plaintiff or anyone dealing with plaintiff in his capacity as a producer, buyer, packer or handler of wholesome and sound raisins, and enjoining defendants from in any manner annoying, harassing or molesting plaintiff or persons doing such business with him. (P. III, R. 60.)

The final judgment conforms to the findings of fact. (R. 61 and 62.)

The findings of fact conform to the allegations of the first amended complaint and show that the defendants are attempting to control the quantity, time of flow, and the price of raisins in interstate commerce, a product which cannot find any consumptive outlet except in interstate commerce, that is, as to 90% to

95% of the raisins which are used for human consumption, and that is practically the only means by which they are ultimately disposed of.

4. Decision of three judge court—cross-demand.

The Agricultural Prorate Act not only required the defendants to formulate a program for the marketing and handling of raisins but it required them to enforce the same. Defendants plead the adoption of a program and their intention and purpose of enforcing the same. In the majority opinion of the court we cite at page 30 of the record the following:

> "The defendant Proration Zone No. 1 filed a cross-complaint praying that the Act and program thereunder be declared a valid exercise of the police power of the State of California, that the plaintiff be enjoined from refusing to comply therewith, and for an accounting and damages for his failure to comply in the past."

While the cross-complaint of defendants was not made a part of the record on appeal, the opinion of the court was. The above quotation is made for the purpose of showing the persistent attitude of the defendants in their attempt to interfere with interstate commerce in raisins.

The opinion further recites:

> "It will be seen that with the Act and program thereunder in operation, the plaintiff as packer who contracts for delivery of a very large percentage of the raisins he handles directly into interstate commerce, cannot freely purchase raisins directly from the producer, for, except as

to the 'free tonnage' raisins, he must make his purchase from the Zone representatives under restrictions herein mentioned, and as to the 30% free tonnage he must make his purchases only when the raisins are accompanied by the secondary certificate showing full compliance with the program.

There is in evidence a copy of the 'Stabilization Pool Sales Policy' set up by the Zone Agent, which recites that the Program Committee reserves the right to determine the eligibility of packers to purchase stabilization pool raisins, and that in order to be eligible to purchase raisins from the committee a packer must be completely current in respect to payment of secondary proration certificate fees. Another item taken into consideration in the determination of eligibility to purchase raisins is whether or not there has been complete proration of all raisins in the packer's possession or on his premises.

It comes to this, that the plaintiff cannot, without violating the provisions of the program, purchase any raisins for his interstate or intrastate business from a grower who does not have the certificate showing his full compliance with the program, and the evidence is clear that plaintiff took orders for out-of-state delivery which he could not fill by purchase of so-called 'free tonnage' raisins and could not fill at all because of the program pool without complying with the program. Nor can he under the regulations prescribed by the Program Committee purchase any raisins deposited in the stabilization pool if he has on his premises or in his possession any raisins that are not accompanied by the certificate showing proration by the grower thereof." (R. 35.)

5. Sufficiency of the pleadings.

Briefly, the complaint sets forth in substance the terms and provisions of the Agricultural Prorate Act, the terms and provisions of the raisin program adopted and put into effect by appellants (hereinafter referred to as defendants), and the intention to and the actual control by defendants of the entire raisin business of California in relation to the shipment and sale of raisins in interstate commerce. It is alleged that all substandard raisins and inferior raisins are taken over by defendants and withdrawn from the market; that 70% of the balance of the producers' raisins are taken control of by the defendants—20% thereof are placed in a surplus pool, to be sold by defendants for by-product purposes, and 50% are to be sold by defendants at such times, in such amounts, and at such prices as the defendants shall determine; that the producer may dispose of the remaining 30% of the balance of his raisins, provided he has submitted to the program in all other respects and pays $2.50 per ton on the 30%; that 90% to 95% of all raisins consumed must be sold in interstate and foreign commerce.

Plaintiff, as both a producer and packer, is denied the right to sell and dispose of his own raisins in interstate commerce; he is denied the right to buy from other producers to fill and meet his interstate contracts for the sale of raisins; defendants are attempting to monopolize and control the entire raisin business in interstate commerce. In order to effectually prevent plaintiff from carrying on his business, de-

fendants maintain watchers at plaintiff's place of business to prevent others selling and delivering raisins to plaintiff. In order to make their control of the raisin business complete, they have filed actions against the plaintiff, demanding penalties in the sum of $13,000.00, and, in fact, in the present action they have cross-complained, asking for specific enforcement of the program against plaintiff, for an accounting, and for damages.

As to the sufficiency of the allegations see *Anderson v. Shipowners' Association of Pacific Coast; et al.*, 272 U. S. 359, 47 Sup. Ct. 125.

The complaint combines in one cause of action the necessary allegations to show a combination in restraint of interstate commerce and a combination for the purpose of monopolizing interstate commerce in raisins.

6. **Authorities.**

The pleadings, evidence, findings and judgment show a violation of two sections of the Sherman Anti-Trust Law.

In U. S. C. A., Title 15, Section 1, illegal contracts, etc., are defined as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, * * *."

In U. S. C. A., Title 15, Section 2, we find this definition:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

In Report No. 134, 2d Series, of the U. S. Tariff Commission (of which this court takes judicial notice), entitled: "Grapes, Raisins and Wines", published in 1939, the following appears at page 142:

> "Commercial production of raisins in the United States is confined to California. There has been a small prod ction in Arizona, New Mexico, and Utah but it has been too insignficant to be recognized by the trade, and statistics of production are not available. In California the industry is located in the upper San Joaquin Valley, in the central part of the state, principally in Fresno County, but spreads into Tulare, Kings, Madera, and other adjoining counties."

Defendants had under their control all raisins produced in the United States, with the exception of the bleached Thompson raisins, which were of negligible amount. Defendants were, by Agricultural Prorate Law and their official authority, attempting to force all raisin growers to submit to the raisin program, also to control the amount and time and manner of shipment and the sale and the price of all raisins produced within the United States.

Defendants insist that their conduct relates only to the production of raisins, and not to them as an article of interstate commerce. In view of the fact that the raisins haven't any market except in interstate and foreign commerce, it is idle to say that the acts of the defendants do not seek to and do not control and burden interstate commerce. However, if their acts related only to production, the result of their acts would still be an interference with and a burden upon interstate and foreign commerce.

In *Coronado Coal Company, et al. v. United Mine Workers of America*, 268 U. S. 295, 69 L. Ed. 963, 45 Supreme Court 551, at page 556, the court was considering the action of the miners in destroying the mine and its property in order to avoid shipment of the product in interstate commerce. It held the conduct of the miners in violation of the Anti-Trust law and said:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act. United Mine Workers v. Coronado Co., 259 U. S. 344, 408, 409, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; United Leather Workers v. Herkert, 265 U. S. 457, 471, 44 S. Ct. 623, 68 L. Ed. 1104, 33 A. L. R. 566; Industrial Association

v. United States, 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849, decided April 13, 1925. We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines, and that the direction by the District Judge to return a verdict for the defendants other than the International Union was erroneous."

See

Apex Hosiery Co. v. Leader, 310 U. S. 469, 60 Sup. Ct. 982, defining purpose of anti-trust law.

In *Standard Oil Company of Indiana, et al. v. United States*, 283 U. S. 163, 75 L. Ed. 926, 51 Supreme Court 421, 423, the court was considering a contract made between three gasoline processing patentees with respect to the effect of the agreement on interstate commerce and stated:

"Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix the price of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. Swift & Co. v. United States, 196 U. S. 375, 397, 25 S. Ct. 276, 49 L. Ed. 518; Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. Ed. 963; United States v. Trenton Potteries Co., 273 U. S. 392, 47

S. Ct. 377, 71 L. Ed. 700, 50 A. L. R. 989. And pooling arrangements may obviously result in restricting competition. Compare Northern Securities Co. v. United States, 193 U. S. 197, 326, 24 S. Ct. 436, 48 L. Ed. 679. The limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act and supplementary legislation. Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20, 33 S. Ct. 9, 57 L. Ed. 107; Virtue v. Creamery Packing Manufacturing Co., 227 U. S. 8, 33 S. Ct. 202, 57 L. Ed. 393; Compare United Shoe Machinery Co. v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708; United States v. General Electric Co., 272 U. S. 476, 47 S. Ct. 192, 71 L. Ed. 362."

The California Prorate Act and the Raisin Prorate Program bottomed upon the same made it illegal for a grower to sell to Brown, and made it illegal for Brown to buy from a grower, unless there had been on the part of each of them a complete submission to the program, but buying and selling for the purpose of interstate commerce is a part of interstate commerce.

In passing upon a price fixing provision relative to milk under the Federal Statute, in *United States v. Rock Royal Co-op.*, 59 Sup. Ct. 993-1010, 307 U. S. 533, decided June 5, 1939, the court referred to and followed the *Lemke* case, hereinafter cited, and stated:

"The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant'. It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins

> and that the attempt to fix the price or other elements of that incident violates the Tenth Amendmen, U. S. Const. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce."

If, in that case, the sale was not a local transaction but an incident of interstate commerce, then in the instant case the sale by the producer of raisins and the purchase by packer Brown is an incident of interstate commerce and not subject to state control.

In *Currin v. Wallace*, 306 U. S. 1, 59 Supreme Court 379, the court said:

> "* * * Where goods are purchased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation. * * *"

In *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 49 S. Ct. 1, the court, in speaking of interstate commerce, said:

> "In determining what is interstate commerce, courts look to practical considerations and the established course of business. Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; Lemke v. Farmers Grain Co., 258 U. S. 50, 59, 66 L. ed. 458, 464, 42 Sup. Ct. Rep. 244; Binderup v. Pathe Exch., 263 U. S. 291, 309, 68 L. ed. 308, 316, 44 Sup. Ct. Rep. 96; Shafer v. Farmers Grain Co., 268 U. S. 189, 198, 200, 69 L. ed. 909, 914, 915, 45 Sup. Ct. Rep. 481. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among states.

And a state statute that operates directly to burden any of its essential elements is invalid. Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; Shafer v. Farmers Grain Co., supra, 199 (69 L. ed. 914, 45 Sup. Ct. Rep. 481). A state is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state. Pennsylvania v. West Virginia, 262 U. S. 553, 596, 67 L. ed. 1117, 1132, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658; West v. Kansas Natural Gas Co., 221 U. S. 229, 255, 55 L. ed. 716, 726, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564. * * * Consistently with the act, all may be, and in fact nearly all is, caught for transportation and sale in interstate commerce. As to such shrimp, the protection of the commerce clause attaches at the time of the taking. Dahnke-Walker Mill Co. v. Bondurant, supra. Pennsylvania v. West Virginia, supra, 596 et seq. (67 L. ed. 1132, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658)."

In *Shafer v. Farmers' Grain Co.*, 268 U. S. 189, 45 S. Ct. 481, 485, 69 L. ed. 909, the court said:

"Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right; the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution."

To same effect, see:

Grandin Farmers' Co-op. Elevator Co. v. Langer, 5 Fed. Supp. 425 (affirmed without opinion in 292 U. S. 605, 78 L. ed. 1467);

Lemke v. Farmers Grain Company, 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244;

West v. Kansas Natural Gas Company, 221 U. S. 229, 31 S. Ct. 564, 55 L. ed. 716.

A combination to control prices locally or to monopolize control of prices locally, which directly burdens and affects interstate commerce, is a violation of the Sherman Anti-Trust Law. In *U. S. v. Wrightwood Dairy Co.,* 315 U. S. 110, 62 Sup. Ct. Rep. 523, by way of dictum, the Court said, at page 526:

> "(4) Competitive practices which are wholly intrastate may be reached by the Sherman Act, 15 U. S. C. A. Paragraphs 1-7, 15 note, because of their injurious effect on interstate commerce. Northern Securities Company v. United States, 193 U. S. 197, 24 S. Ct. 436, 48 L. Ed. 679; Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518; United States v. Patten, 226 U. S. 525, 33 S. Ct. 141, 57 L. Ed. 333, 44 L. R. A., N. S., 325; Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; Local 167 v. United States, 291 U. S. 293, 54 S. Ct. 396, 78 L. Ed. 804; Stevens Co. v. Foster & Kleiser Co., 311 U. S. 255, 61 S. Ct. 210, 85 L. Ed. 173."

There is no immunity for state officers who violate a federal law. In *Ex parte Young,* 209 U. S. 123-159, 52 L. Ed. 714-729, it is said:

"If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility, to the supreme authority of the United States. See Re Ayers, 123 U. S. 507, 31 L. Ed. 230, 8 S. Ct. 164."

He is merely proceeding under the color of an unconstitutional law.

In *Re Ayers,* supra, the court said:

"Nor need it be apprehended that the construction of the 11th Amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a State are guilty of acting in violation of them under color of its authority. The Government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority; and the extent and limits of that authority the Government of the United States,

by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

In *Worcester County Trust Co. v. Riley*, 302 U. S. 292-7, 58 S. Ct. 185-7, 82 L. Ed. 268, the court said:

"The Eleventh Amendment, which denies to the citizen the right to resort to a Federal Court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."

Poindexter v. Greenow, 114 U. S. 270, 5 S. Ct. 903, 913, 962, 29 L. Ed. 185.

Section 1 of the Sherman Anti-Trust Law forbids contracts or combinations in restraint of trade. Section 2 forbids monopolies in interstate trade and commerce.

Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co., 39 S. Ct. 38, 248 U. S. 55, 63 L. Ed. 123;

United States v. Socony-Vacuum Oil Co., 60 S. Ct. 811-~~844-6~~, 310 U. S. 150, 223-8, 84 L. Ed. 1129.

The court in the above cases also lays down certain principles applicable here.

Reasonableness of prices (if such were a fact) paid by the defendants is immaterial. Economic conditions do not justify or make right a violation of the Act.

Knowledge or acquiescence of government officials in wrongdoing will not give validity or legality to the act of defendants.

310 U. S. 225-8, 60 S. Ct. 846-8.

In *Georgia v. Evans, et al.*, 62 S. Ct. 972, 86 L. Ed. 929, it was held that the word "person", as defined under the Sherman Anti-Trust Law, included a state, at least to the extent that the state might sue for treble damages where it had been injured by a combination in restraint of trade. To hold that the state is a person under that act, in the sense that it may avail itself of the procedural remedy therein provided, does not necessarily mean that the state by taking advantage of such provision would waive its immunity under the Eleventh Amendment to the Federal Constitution, which exempts it from all manner of actions to enforce obligations. Congress has the power to bestow the right to sue upon a state, but not the right to give third persons the right to sue a state. However, the question seems more academic than important for state officials who, in attempting to enforce unconstitutional state laws, combine so as to restrain interstate commerce or to create a monopoly in interstate commerce, are subject to the Sherman Anti-Trust Law; because the state cannot bestow upon them

immunity for their transgressions of the federal and superior law.

Another principle applies to the defendants who claim to be state officials. That principle is that where a state voluntarily appears in a case against it and cross-complains for enforcement of its rights, the state waives its immunity.

Clark v. Barnard, 108 U. S. 436-47, 27 L. Ed. 780, 784-5.

If a sovereign litigates, he must play the role like any other litigant and take the consequences.

United States v. National City Bank of New York, 83 Fed. (2d) 236-8;

Richardson v. Fajardo Sugar Co., 241 U. S. 44, 36 S. Ct. 476, 60 L. Ed. 879.

In the above case, after voluntarily appearing in an action, Porto Rico was compelled to pay back illegally collected taxes.

In *People of Porto Rico v. Ramos*, 232 U. S. 637, 34 S. Ct. 459, 58 L. Ed. 767, where Porto Rico voluntarily appeared as defendant in an action, the plaintiff was given judgment for $6000.00 damages against the government. Claims of immunity in each of the above cases were denied by the Supreme Court.

Congress has considered the deprivation of a citizen's rights under the Constitution to be so serious that it has enacted Sections 19 and 20 of the U. S. Penal Code.

Under the provisions of Section 19 it is a crime to conspire to deprive any citizen "of a right or privilege secured to him by the Constitution or laws of the United States", and Section 20 makes it a penal offense for any one who "acting under color of any law * * * wilfully subjects, or causes to be subjected, any inhabitant of any state * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States".

The defendants in the instant case are certainly depriving Brown of his rights, privileges and immunities under the Constitution.

A recent decision, wherein state officials who tampered with election returns were held amenable to those sections, is *United States v. Classic, et al.* (La. Primary Election Case), 313 U. S. 299, 325 (paragraph 14), 61 S. Ct. 1031-1042 (14).

CLAYTON ACT.

The Clayton Act is merely a supplemental enactment to that of the Sherman Anti-Trust Act, enlarging and broadening the scope of the anti-trust laws. It has to do with discrimination in sales and discounts which amount to discriminations in sales price, whereby control of price in interstate commerce and the development of monopolies in interstate commerce may be brought about. It also prohibits any contracts or agreements restraining a buyer from buying or

dealing in products of competing vendors. A procedure is outlined for redress of the wrong brought about by any violation of the anti-trust laws. The acts of the defendants in the instant case do not seem to conflict with any of the provisions of the Clayton Act, but the procedural provisions of the Clayton Act apply and plaintiff's action sufficiently sets forth facts to bring them within the protection of the procedural provisions of the Clayton Act.

AGRICULTURE ADJUSTMENT ACT.

U.S.C.A. Title 7, Sections 601 to 611, inc. (613).

Interstate commerce is a matter subject to the control of Congress to the exclusion of state control. Even though Congress does not act, the state is powerless to act. In *Simpson v. Shepard*, 230 U. S. 352, 33 Supreme Court 729, 57 Lawyer's Edition 1511, the court said:

> "If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of federal regulation should be free. (57 Law. Ed., p. 1540.)
>
> "The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand

that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. * * *

"The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislative constitutionality ordains. (57 Law. Ed., p. 1541.)"

The North Dakota cases, that is, the *Lemke*, *Shafer*, and *Grandin* cases lay down a similar principle of law.

An outline of the provisions of the Agricultural Adjustment Act will show that Congress has placed upon the shoulders of the Secretary of Agriculture the duty to ascertain and determine when there shall be, and the nature of the regulation of, interstate commerce in agricultural commodities. In U. S. C. A. Title 7, Section 601, it is declared:

"It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national pub-

lic interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25 Title I, Sec. 1, 48 Stat. 31; June 3, 1937, c. 296, Sec. 1, 2(a), 50 Stat. 246."

In Section 602, Congress sets forth its policy as follows:

"It is hereby declared to be the policy of Congress:

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. * * *.

"(2) To protect the interest of the consumer by * * *, (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

The state prorate act enforces no such national policy.

In Section 610, Subdivision (j), interstate or foreign commerce is specifically defined as:

"The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the

> District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this chapter (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. As used herein, the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nations."

The provisions of Section 608c require the Secretary of Agriculture from time to time to issue orders respecting the handling of agricultural products (including fruits, which includes raisins) in interstate commerce. These orders of the Secretary of Agriculture constitute a program for the proper handling and marketing of such products. Paragraph (6) of Section 608c contains an outline of the order which

the Secretary of Agriculture may make respecting the matter with regard to limitation of quantity, quality, grade, standard, etc. He shall also provide for the handling of surplus products and provide for reserve pools. Paragraph (7), Subdivision (C) of Section 608c, requires that the Secretary of Agriculture shall select and designate an agency or agencies defining their powers and duties. In other words, the agency or agencies are the administrative officers of the program, subject, of course, to the control at all times of the Secretary of Agriculture. Paragraph (8), Section 608c, provides that before putting the program of the Secretary of Agriculture into operation, it must be approved by 50% of the handlers of the agricultural products. Subdivisions (A) and (B) of Paragraph (8), Section 608c, provide that there must be an acceptance of the program by two-thirds of the producers as well as producers who have produced for market at least two-thirds of the volume of such commodity. Other paragraphs of this section relate to variations in the program, in the installation of the same, regional control, etc. All, however, more specifically define and outline the authority of the Secretary of Agriculture in establishing and inaugurating the program. Section 610 vests in the Secretary of Agriculture plenary power for the selection of employees and for the appointment and selection of local committees, associations of producers, and others to administer the program.

The foregoing outline of Agricultural Adjustment Act indicates not only that Congress recognizes its

right and duty of exclusive control of interstate commerce, but it also recognizes its duty to control all acts and matters which directly affect and burden interstate commerce, even when separately considered might be considered local or intrastate matters. The mere fact that the program set up by the Secretary of Agriculture may not be inaugurated because the requisite number of producers and handlers do not vote for it does not withdraw from Congress the power of control or the right of control, nor increase the power of the states over such matters, neither does it give the states a license or permit to assume such control.

In *Oregon-Washington Railroad & Navigation Company v. State of Washington*, 270 U.S. 87, 46 S. Ct. 279, 70 L. Ed. 482 the court had for consideration an Act of the State of Washington prohibiting the importation into the state of diseased alfalfa seed from adjoining states. By the Act of Congress of August 20, 1912, and subsequent amendments, it is made unlawful to import or offer for entry into the United States, any nursery stock unless permit had been issued by the Secretary of Agriculture under regulations prescribed by him. Section 8 of the act as amended gives the Secretary of Agriculture of the United States authority to quarantine any state, territory, or district of the United States, or any portion thereof, when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and

throughout the United States. The regulation was to apply to all manner of plants, fruits, vegetables, seeds, etc. The act further provided:

"That it shall be the duty of the Secretary of Agriculture, when the public interests will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined state or territory or district of the United States, or quarantined portion thereof, into or through any other state or territory or district; and the Secretary of Agriculture shall give notice of such rules and regulations as hereinbefore provided in this section for the notice of the establishment of quarantine: Provided, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to quarantine any state, territory, or district of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give a public hearing under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney."

The Supreme Court said:

> "It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal government the care of the horticulture and agriculture of the states, so far as these may be affected injuriously by the transportation in foreign and inter-state commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine against importation into the country and quarantine as between the states under the direction and supervision of the Secretary of Agriculture."

The court distinguished the case of *Reid v. Colorado*, 187 U. S. 137, by saying that the federal statute there involved was one which invited and brought about state and federal cooperation in the enforcement of quarantine regulations relative to animals, saying:

> "Indeed the Commissioner of Agriculture in that case was to aid the state authorities in their quarantine and other measures from Federal appropriation. The act we are considering is very different. It makes no reference whatever to cooperation with state authorities. It proposes the independent exercise of Federal authority with reference to quarantine in interstate commerce. It covers the whole field, so far as the spread of the plant disease by interstate transportation can be affected and restrained. With such authority vested in the Secretary of Agriculture, and with such duty imposed upon him, the state laws of quarantine that affect interstate commerce and

thus Federal law cannot stand together. The relief sought to protect the different states, in so far as it depends on the regulation of interstate commerce, must be obtained through application to the Secretary of Agriculture."

The court then concludes:

"It follows that pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject cannot be given application. It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that cannot be given to the Federal statute. The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, state action is illegal and unwarranted."

The Washington case is parallel with the instant case, for the Agricultural Adjustment Act does not provide for cooperation. It leaves the matter of regulation of interstate commerce entirely to the investigation and determination of the Secretary of Agriculture. His failure to act does not justify action on the part of the State of California. The Agricultural Adjustment Act completely covers the field, as did the quarantine law in the Washington case.

In *Napier v. Atlantic Coast Line Railroad Company*, 272 U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432, the question before the court was whether the Federal Locomotive Boiler Inspection Act of February 17, 1911, as amended,

> "has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation."

The State of Georgia passed a law requiring "an automatic door to the fire box."

The State of Wisconsin passed a law which prescribes a cab curtain for the cab.

The federal act provided, in Section 2:

> " 'That it shall be unlawful for any carrier to use or permit to be used on its lines any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.' "

The court stated:

> "Other sections confer upon inspectors and the commission power to prescribe requirements and establish rules to secure compliance with the provisions of Section 2. From time to time since the

passage of the original act, the commission has required that locomotives used in interstate commerce be equipped with various devices. But it has made no order requiring either a particular type of fire box door or a cab curtain. Nor has Congress legislated specifically in respect to either device."

The court further stated:

"Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances.

"The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in Vandalia R. Co. v. Public Serv. Commission, 242 U. S. 255, 61 L. ed. 276, P.U.R. 1917B, 1004, 37 Sup. Ct. Rep. 93. We think that power was conferred. The duty of the commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the commission sets the standard.

By setting the standard it imposes requirements. The power to require specific devices was exercised before the Amendment of 1915, and has been extensively exercised since."

"The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automatic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purpose. (Authorities omitted.)"

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample. Obviously, the rules to be prescribed for this purpose need not be uniform throughout the United States; or at all seasons; or for all classes of service."

a. Agricultural Prorate Act. (Calif. Statutes of 1933, page 1939, and amendments; Statutes of 1939, Chapters 363, 548, and 894.)

The federal act does not in any way authorize or empower the states to assume control of interstate commerce. In fact, it declares a policy to leave the control of the same to the considerate judgment and investigation of the Secretary of Agriculture. In considering our instant problem, we must bear in mind the fact that the entire raisin industry of the United States is located in a small section of the San Joaquin Valley in central California and that 90% to 95% of such raisins are ultimately sold and consumed in interstate commerce, so that any market plan or scheme for disposal of raisins or control of raisin pools must directly affect and burden and control interstate commerce in such raisins.

With the foregoing facts as a basis, let us analyze the purpose and scope of the Agricultural Prorate Act of California and the raisin program bottomed upon it. Section 2 of the Act consists entirely of definitions and distinctions. It defines in particular agricultural waste as ordinary waste as well as economic waste in delivery of farm products to market. It defines "handler", "dealer", and "processor" as persons having to do with the marketing of agricultural products. Sections 3, 4, and 5 of the Act create the Agricultural Prorate Advisory Commission and define its powers. In Section 8 it is provided:

> "An agricultural prorated marketing program may be instituted for a variety or kind of agricultural commodity and may be based either upon a production zone or upon a market zone * * *."

Ten or more producers may file a petition for the establishment of a marketing program. The petition shall contain

(a) a description of the district comprising the zone in which there is to be established the marketing program;

(b) the facts showing the necessity of a proposed marketing program.

Section 9 provides for a hearing upon the petition.

In Section 10 it is provided in substance that if the commission shall find from the petition and the evidence

> 2. That the economic stability, etc. * * * is imperiled by prevailing market conditions;
>
> 3. That the institution of a program of prorated marketing will conserve the agricultural wealth in the State and will prevent threatened economic waste; and
>
> 6. * * * The commodity named in the petition cannot be marketed at a reasonable profit otherwise than by means of such a program; and
>
> 7. That the proposed zone of proration includes all of the producing territory, etc. * * *,

then, and in that event, the commission shall make findings accordingly and grant or deny the petition.

After the hearing on the petition all producers are given notice that a program is proposed and the number of acres with which the producer is credited. Under Section 15 a program committee is elected by the growers. This program committee "shall formulate a proration marketing program which shall be

submitted to the commission". The commission shall approve or disapprove the program, or may modify it and approve it as modified. The commission must fix a date prior to which the program, in order to become effective, must be consented to by the producers. Under the terms of Section 16 the Director of Agriculture must submit the program to the producers for their approval or disapproval. If, on a canvass of the returns, it shall appear that 65% of the producers and the owners of 51% or more of the producing factors have assented in writing to the program, the Director shall declare the program instituted. It is also provided in said section that the zone shall constitute a separate public corporate entity, and that its affairs shall be managed by a program committee appointed as herein provided.

Section 18.1 provides that the marketing program to be made effective shall be so formulated as to rectify, as far as possible, adverse marketing conditions and to maintain market stability under the limitation of the act. The marketing program may be modified in certain particulars outlined in the section. Section 19 provides, under the authority of a marketing program, a program committee shall determine the method, manner and extent of proration, and the movement of prorated commodity from harvest into a primary channel of distribution. Section 19.1 provides that the committee for the purpose of minimizing the effect of surpluses or other adverse market conditions may be empowered in any program

(a) to establish and maintain either surplus or stabilization pools. The committee shall designate the

quantity that shall be placed in the respective pools and the committee shall have title to the property in the pools.

1. The surplus pools cannot be marketed in competition with the stabilization pool, but may be turned over by the committee to charitable organizations, etc.

2. The stabilization pool may be marketed at such time as the program committee deems advisable.

Section 20 provides for the issuance of primary and secondary certificates evidencing the producers' compliance with the orders of the program committee. Heavy penalties are imposed by Sections 22.5, Section 24, and Section 25 of the Act.

The Act deals almost entirely with marketing. The purpose of the Act is to control the marketing of agricultural products. It not only controls the producer's sale and disposition of his crop, but it subjects the handler, distributor, and processor to the domination and control of the program committee with respect to the purchase and sale of products.

To make doubly sure that the Agricultural Prorate Act deals with marketing, we finally quote from the preamble to the Act, in Section 1 thereof, as follows:

> "An act to conserve the agricultural wealth of the State of California, and to prevent economic waste in the marketing of agricultural products or crops produced in the State of California, * * *"

b. **Raisin prorate program.**

The Agricultural Prorate Act, as implemented by the raisin program, becomes a direct impediment to interstate commerce. We repeat, the program, as amended and in effect for the season of 1940, provides that a producer must deliver to the Zone all his inferior raisins (see definition page 34), and all of his substandard raisins (R. 34), without compensation. (R. 19, paragraph 13 (d).) The program committee, however, on any sale of the goods for by-product purposes, shall distribute any net proceeds among the producers. Sub-standard raisins are usable and desirable for human consumption. (R. 34; paragraph VIII, R. 57.) After delivery of the sub-standard and inferior raisins, the producer must then deliver 20% of the balance of his raisins into a surplus pool, for an advance of $27.50 per ton. (R. 18.) Next he must deliver 50% of the balance into a stabilization pool, for an advance of $55.00 per ton, to be disposed of at such time and in such amounts and to such buyers and at such prices as the defendants might determine. (The program, however, which was actually put into effect forbade the sale of stabilization raisins (Plaintiff's Exhibit 7, R. 75) until after January 1, 1941, which date was a considerable time after the 1940 crop would, if unrestricted, go into the normal channels of interstate commerce. (R. 107.)) The remaining 30% of his raisins may be disposed of by the producer, if he has complied with the foregoing conditions and has paid an additional $2.50 per ton upon his 30% to the Zone. As the stabilization pool raisins can only be disposed of through normal marketing

channels, the Program defines normal marketing channels as follows:

> "Those merchandising channels through which handlers customarily dispose of raisins for human consumption as raisins." (R. 35.)

The program limits the persons who can buy standard or surplus pool raisins or with whom it will deal. This rule excludes persons like appellee who do not conform to the Program. (Pl. Ex. 7, R. 75.)

To deprive one of the right to sell sound wholesome articles of commerce for interstate shipment, or to deny one the right to buy such articles for interstate shipment, is a definite and direct interference with interstate commerce.

The policy manifested in the Agricultural Adjustment Act is to place under the control of the Secretary of Agriculture the entire question as to when and to what extent there shall be any regulation of the buying and selling of agricultural products for interstate traffic; when sound and wholesome articles of interstate commerce shall have access to the normal channels of interstate trade. When Congress has made such a specific declaration of policy, it seems there is necessarily implied a prohibition of state action on such matters.

Cloverleaf Butter Co. v. Patterson, 62 S. Ct. 491, 315 U. S. 148;

Napier v. Atlantic Coast Line Railroad Co., supra;

Oregon-Washington Railroad & Navigation Co. v. State of Washington, supra.

The opinions in the *Cloverleaf Butter Co.* case, supra, contain a full discussion of the authorities.

Congress, by its definition of "commerce" in the Agricultural Adjustment Act, specifically empowers the Secretary of Agriculture to govern and control such intra-state matters as shall directly burden or affect such commerce. Normally, ordinary buying and selling of products is a local matter, but when it is a part of the current of interstate commerce, it is in a field beyond the scope of legitimate state action. The raisin industry depends absolutely upon interstate traffic for its existence. To interfere with, limit or embargo transactions which are necessarily a part of that current traffic is a serious interference with interstate commerce.

The federal and state acts are wholly inconsistent, because each act assumes control of the entire traffic in raisins. They cannot operate together. The superior federal statute must prevail, and the state act must give way.

Such result would follow under the ordinary interpretation of the interstate commerce clause. However, where Congress has made such a specific declaration of policy with respect to the matter and placed the enforcement of that policy within the hands of the Secretary of Agriculture, there seems to be no room left for doubt or quibble. The raisin program is a thinly disguised scheme to obstruct and control the entire interstate traffic in raisins. Such subterfuges are specifically prohibited by the Agricultural Adjust-

ment Act. (See definition of "commerce" in Act, Section 610 (j).)

The mere fact that a program has not been put into effect by the U. S. Secretary of Agriculture does not detract from the force of the policy adopted by Congress. The mere fact that goods must be stopped after purchase or delayed in transportation for processing purposes does not affect the transaction as one within the protection of the commerce clause or the Agricultural Adjustment Act. (See same definition.) Where a packer purchases raisins to fill interstate orders, the preparation or processing of the raisins is but an incident in the interstate traffic and does not detract from the transaction as one in interstate commerce.

In *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 62 S. Ct. 384, the appellant was engaged in buying and receiving gas from the lines of Panhandle Eastern Pipe Line Company (which owned and transmitted gas from the fields in Texas and other states into and through Illinois and Indiana). Appellant, in turn, sold the gas to various local distributors and some industrial plants. All of appellant's business was transacted in the State of Illinois, where it received the gas from the Panhandle Company, of which company appellant was an operating auxiliary. The Illinois Commerce Commission had on petition of appellee, a local distributor of natural gas, ordered appellant to make connections with appellee's distributing system and to supply appellee with gas for its customers.

The gas which appellant handled came from the fields in Texas and elsewhere, under pressure furnished by Panhandle Company. Appellant received its gas from the pipe lines of the company, then reduced the pressure in its own lines to meet the needs of those to whom it sells. Its customers, in turn, reduce the pressure according to the needs of their customers.

The Illinois Commerce Commission held appellant's business to be wholly intrastate, and the Supreme Court of Illinois upheld that ruling, stating that appellant's business became intrastate as soon as it reduced the pressure in its pipes and resold the gas. The Supreme Court, in deciding the case, said that it was not important in determining the character of the commerce to know at what point in the movement of the gas the title to the same passed to appellant. The Supreme Court had previously held that where a gas company, receiving gas through interstate sources, reduced the pressure and sold direct to the customers, the resale or such sale was an intrastate action subject to state regulation. However, the court has held that the resale to local distributors is not intrastate commerce.

The importance of the case to the local issue is that Congress had passed the Natural Gas Act of June 21, 1938, vesting in the Interstate Commerce Commission power to regulate the wholesale distribution to public service companies of natural gas moving in interstate commerce. By such regulation Congress "undertook to regulate a defined class of natural gas distribution

without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases." The extension of facilities of such an interstate dealer in gas could be made only after getting a certificate of public convenience from the Interstate Commerce Commission.

In deciding the case the Supreme Court said:

> "In determining the scope of the federal power over the proposed extension of facilities and sale of gas it is unnecessary to scrutinize with meticulous care the physical characteristics of appellant's business, in order to ascertain whether, as the court below held, the interstate commerce involved in bringing the gas into the state ends before delivery to distributors. In any case the proposed extension of appellant's facilities is so intimately associated with the commerce and would so affect its volume moving into the state and distribution among the states as to be within the Congressional power to regulate those matters which materially affect interstate commerce, as well as the commerce itself. (Cases cited.)
>
> "As Congress, by section 7(a) (c) of the Act has given plenary authority to the Federal Commission to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them, and since no certificate of public convenience and necessity, required by section 7(c), has been granted to appellant by the Federal Commission for the proposed extensions and sale, the state commission was without power to order them."

While there is a difference between the powers vested in the Secretary of Agriculture under the Agricultural Adjustment Act and the powers vested in the Interstate Commerce Commission under the Natural Gas Act, yet in each act there is vested in a government official or commission the power to act, with duty to act, with respect to a certain matter, and the principle of appropriation of field of legislation should apply equally in the two instances. Let us illustrate: Congress has vested the power in the Secretary of Agriculture with the duty to act and regulate interstate commerce and local transactions affecting interstate commerce with respect to agriculture, in all cases where economic conditions require such action. If economic conditions require action on the part of the state, it would naturally require action on the part of the Federal Secretary of Agriculture. As his duty and power cover the same field, it naturally excludes action by state authority, as in the gas company case, state action was excluded by reason of the power vested in the Interstate Commerce Commission.

We reiterate that the mere fact that the Secretary of Agriculture has not acted does not increase or enlarge the powers of the state, neither does it lessen the declaration of policy or the scope or field of action bestowed upon the Secretary of Agriculture for the control of interstate commerce in agricultural products.

DUE PROCESS—UNDER THE FOURTEENTH AMENDMENT.

Appellee, in addition to his business as a packer, produced 200 tons of raisins in the year 1940. (R. 76.) By Section 19.1 of the Agricultural Prorate Act title to 70% of these raisins was taken from appellee (unless appellee had no desire to commercially dispose of them). There was no right of appeal or protest against such vesting of title. The act gave to appellee in exchange for title to his raisins an equitable interest in the proceeds of the sale thereof. (Section 19.1.) By virtue of the seasonal program adopted for the year 1940, the producer was entitled to an advance of $55.00 on the raisins delivered to the 50% stabilization pool and an advance of $27.50 on the raisins delivered to the 20% surplus pool (R. 18), but there is no provision in the act or in the Marketing Program For Raisins As Amended (quoted in the printed Statement As to Jurisdiction) authorizing an advance, and therefore the next seasonal program may conceivably provide for no such advance. Even the 1940 program returns to the producer nothing for his sub-standard raisins (these being good for human consumption, R. 34, Note 7) and his inferior raisins, excepting an equitable interest in the proceeds of the sale for by-product purposes of such raisins made by the Program Committee. (R. 19.) Appellee testified incidentally that he received nothing for his raisins delivered to the 1938 surplus pool (R. 94) so it is problematical whether he would receive anything for his 1940 sub-standard or inferior raisins, or anything more than the original advances made on the raisins delivered to the 1940 stabilization and surplus pools.

Thus, title to the bulk of appellee's raisins would have been vested by legislative fiat in the prorate zone and appellee would have lost all right to determine to whom the raisins should be sold, the price, the time of sale, and the conditions of payment. The producer was required to surrender title to his raisins in exchange for a future equitable interest in the proceeds of the sale by the Program Committee of all the raisins in the pools.

For each violation of the act appellee, as both a producer and handler of raisins, would have been subjected to heavy civil and criminal penalties. (Sections 22.5 and 25 of the Act.) These penalties are so severe as to bring into application the principles announced in *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714.

CAPPER-VOLSTEAD ACT. (U.S.C.A., Title 7, Sections 291-292.)

At the oral argument appellants suggested that the Zone was a cooperative and not restrained by the commerce clause or the Sherman Anti-Trust Law but enjoyed a special immunity.

The Capper-Volstead Act relates solely to persons engaged in the production of agricultural products who voluntarily form cooperative organizations to further their own transactions in interstate commerce. It does not embrace or authorize state control of manipulated organizations where membership may be or is compulsory. Neither does it permit combinations of producers and nonproducers.

U. S. v. Borden Co., 308 U. S. 188, 60 S. Ct. 182;

U. S. v. Elm Spring Farm (D. Ct. Mass., 1941), 38 F. Supp. 508.

Needless to say, that which is compulsory is not cooperative. The word "cooperative" means voluntary association.

SUMMARY.

The pleadings, as a whole, show acts on the part of defendants in setting up and enforcing the raisin program under the Agricultural Prorate Act, constituting both a combination in restraint of trade and a combination monopolizing the shipment, and price, of raisins in interstate commerce. The act authorizing the establishment and enforcement of such a program is unconstitutional and cannot give immunity to defendants for their wrongful conduct.

The Agricultural Adjustment Act manifests and declares a definite and clear policy, on the part of Congress, to assume control of all acts which are deemed reasonably necessary to stabilize and assure sound economic conditions in agricultural products which find their market outlets in interstate and foreign commerce. Congress has definitely appropriated that field of action to itself and ordered the Secretary of Agriculture to act whenever he finds economic conditions require or make reasonably necessary such control. The appropriation of control, by Congress, by its own force, deprives the state of power to act. Hence, state legislation which attempts to assume such control is in conflict with the superior legislation of Congress and must give way.

The Agricultural Prorate Act deprives one of the title to his property without due process of law, for it deprives him of his property by legislative fiat, and without giving him a hearing in court. The act makes the refusal to submit to such arbitrary action so hazardous as to civil and criminal penalties that he is virtually deprived of any chance to contest the seizure of his property. Defendants are already demanding $13,000.00 in civil penalties from Brown. (R. 30.) That is enough to bankrupt the ordinary small packer. The criminal penalties could even yet be enforced.

In filing this additional brief, appellee submits that the authorities cited in his original brief amply justify affirmance of the judgment under a general application of the provisions of the commerce clause. These additional points are presented only to show that the acts of the defendants are violative of the special acts of Congress cited and the due process clause of the Fourteenth Amendment.

Dated, Fresno, California,
September 28, 1942.

Respectfully submitted,

Irvine P. Aten,
Richard V. Aten,
G. L. Aynesworth,
Christian M. Ozias,
William M. Miles,
Attorneys for Appellee.